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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

Nos. 34 and 35

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

WILLIAM KUHN, RESPONDENT.

BRIEF FOR PETITIONER.

DAVID H. LEAKE,
HENRY BANNON,
Counsel for Petitioner.

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The Opinion of the Court Below.

The opinion of the Ohio Court of Appeals in this case appears at page 17 of the record. No opinion was filed by the Supreme Court of Ohio.

The case does not appear to be officially reported as yet, but there is a report of it in 9 Ohio Law Abstract, 378, a publication frequently cited by Ohio courts.

Jurisdiction.

Jurisdiction by certiorari is conferred here by Judicial Code, Sec. 237 (*b*), as amended by the Act of

February 13, 1925, 43 Stat. 937; U. S. C. A., Title 28, Ch. 9, Sec. 344 (*b*).

The date of the judgment to be reviewed is Supreme Court of Ohio, January 28, 1931 (R., 93); Ohio Court of Appeals, December 18, 1930 (R., 16-17).

This action is based on the Act of Congress, as amended, known as the Federal Employers' Liability Act (Act of April 22, 1908, 35 Stat. 65; Act of April 5, 1910, 36 Stat. 291; U. S. C. A., Title 45, Ch. 2, Sections 51 to 59, inclusive), and the court has decided, it is believed erroneously, Federal questions of substance, involving matters of law.

The following cases, selected from a great number, support the jurisdiction:

Atchison, etc., R. Co. *v.* Toops, 281 U. S. 351;

New York, etc., R. Co. *v.* Ambrose, 280 U. S. 486;

Chesapeake, etc., R. Co. *v.* Mihas, 280 U. S. 102;

Pryor *v.* Williams, 254 U. S. 43.

Statement of the Case.

Pleadings and Issues.

This was an action commenced by respondent in the Common Pleas Court of Pike County, Ohio, against petitioner to recover damages for the loss of the sight of an eye during the course of the employment of respondent by petitioner. In his petition, respondent charged petitioner with negligence in failing to provide goggles for his use and negligence in providing a defective hammer and chisel for use in cutting a steel rail (R., 1). Petitioner denied the negligence charged

and denied that respondent was engaged in using either a chisel or hammer or was cutting a rail when he received his injury. Petitioner also pleaded that respondent assumed the risk, and that the cause of action was governed by the Federal Employers' Liability Act (R., 3, 4). Verdict and judgment for respondent were reversed by the Court of Appeals (R., 8) because, among other reasons, the Common Pleas Court should have directed a verdict for the defendant.

After remand, respondent filed an amended and supplemental petition in which he charged petitioner with the same negligence as in the petition and in addition that the foreman of petitioner commanded and ordered respondent to complete his work without the use of goggles for his eyes, and that, pursuant to such command, respondent proceeded with his work and was injured (R., 8, 9). Petitioner pleaded as in the first instance, with the addition of a plea of contributory negligence. A motion of petitioner for a directed verdict, entered at the close of the testimony, was overruled (R., 79-80). There was a verdict and judgment for the respondent. Petitioner moved to vacate the verdict and for a new trial, which was overruled (R., 6). The judgment was affirmed by the Court of Appeals of Pike County, Ohio (R., 13, 15, 16). The case went to the jury under the Federal Employers' Liability Act (R., 80). Pederson *v.* Delaware, etc., R. Co., 229 U. S. 146.

Petitioner filed a motion in the Supreme Court of Ohio, the highest court of the State in which a decision can be had, to certify the record in said cause to said Supreme Court for review, which motion was denied

(R., 91, 93). Petitions for writs of certiorari filed in this court were granted.

A duly certified copy of the record, including all proceedings in the Common Pleas Court, Court of Appeals, and Supreme Court, is filed herewith.

Statement of Facts.

The facts are not in dispute, and, in so far as material, were as follows:

Petitioner and a force of men were repairing the track and roadbed (R., 21, 33, 40, 71) of a railroad engaged (exclusively, it appears) in interstate commerce (R., 70) and respondent was a member of the force. One of the men held a chisel upon a rail while another struck it with a hammer for the purpose of cutting the rail. Respondent was not engaged in doing either work, but was awaiting his turn to use the hammer or maul, such portion of the work being done in relays. While thus standing by, a chip of steel struck his eye. The chip came either from the chisel or the rail, probably from the rail, because bits of steel were being cut from it in order to break it. It was customary for the man holding the chisel and the one using the hammer (R., 45), and perhaps others of the workmen, to use goggles (R., 23, 28, 29, 55). These goggles appear to have been kept at the tool-house (R., 55), though, it was stated, there were none "on the job" on this occasion (R., 22, 46, 51). There was one hammer and three or more men used it in rotation (R., 22). Respondent, on his own statement, was not next in line to use the hammer (R., 28).

The trial court, in the charge to the jury, said:

> "It is not disputed in this case that the plaintiff knew that he had no goggles and knew that the chisel in question was battered and burred at the top, so that on that proposition alone the plaintiff would have assumed the risk" (R., 87).

Such the evidence sustains. Respondent also admitted familiarity with cutting steel rails; that he knew chips were apt to fly from them regardless of whether the tools employed were defective or perfect (R., 29-30). Such risk, it was contended, was transferred from him to petitioner because he was commanded to complete his work without the use of goggles and, pursuant to such command, did so and was injured. No evidence was offered to that effect. The facts were thus summed up by the Ohio Court of Appeals:

> "The evidence discloses that several men were working in the section gang; that while one man held the chisel each of the other men took his turn at striking it with the hammer, and that while plaintiff was waiting his turn to use the hammer he received the injury complained of. The men were in charge of a foreman, and there is some evidence tending to show that the foreman in charge was positive and dictatorial in his manner and, as one witness said, 'The men were kind of raw hided there that morning'. The track was out of repair and the cars had been jumping the track and the foreman was in a great hurry to repair the same. It was necessary to cut two steel rails and place them in the track. There is some evidence that the foreman

> commanded the men 'To gang up around here and don't be afraid', and also that he commanded them to "Gang up and go in a hurry, that he wanted to get thru here'. The plaintiff testified that he was the next man in line to use the hammer and that the foreman said 'Step up close. Be ready to relieve the man that is hammering'. It was while waiting his turn to use the hammer that the plaintiff was struck in the eye by a splinter of steel" (R., 18).

The testimony attributed to respondent, quoted by the court, was not given by him. It appears in the testimony of another (R., 63). Respondent testified that he could not recall any special words, but that the workmen were called up there to do the work. Upon his memory being refreshed he stated that the foreman told him to "gang up and go in a hurry; that he wanted to get through there", and that it seemed to be a hurry-up job (R., 22). Later he testified that instructions were given by the foreman to keep in line (R., 23), and upon redirect examination he reiterated that the foreman told the men to "gang around there and do this work. It was a hurry up job" (R., 30). Other witnesses attributed similar expressions to the foreman (R., 42, 45, 46, 51, 55, 62. 63).

Reasons Relied on for Reversal.

The law applied by the State courts is in conflict with that applied by Federal courts in causes arising under the Federal Employers' Liability Act in the following particulars:

1. The Ohio Court of Appeals reversed the judgment awarded upon the first trial for the failure to direct a verdict and other errors as to matters of law (R., 8) and granted a new trial. When the cause came before the Ohio Court of Appeals for review the second time, the court said:

> "This is the second time this case has been in this court for review. In the first proceeding in error this court reversed the judgment of the Court of Common Pleas on the ground that the verdict of the jury in favor of the plaintiff was against the manifest weight of the evidence. This court cannot reverse the judgment of the Court of Common Pleas a second time on that ground" (R., 18).

The court further held that there was "some evidence tending to prove that the plaintiff might have yielded his own judgment to that of the foreman", and that plaintiff acted under a so-called "peremptory order" and so did not assume the risk.

The ruling of the court in the quoted language is based on Section 11577 of the Ohio General Code, reading as follows:

> "The same court shall not grant more than one new trial on the weight of the evidence against the same party in the same case, nor shall the same court grant more than one judgment of reversal on the weight of the evidence against the same party in the same case." Cleveland Railway Co. *v.* Trendel, 101 Oh. S. 316; Rolf *v.* Heil, 113 Oh. S. 113.

Neither a State statute nor rule of procedure can defeat the principle that a recovery under the Federal Act must be based on substantial evidence.

2. Under the applicable principles of common law, as established and applied in the Federal courts, respondent assumed the risk of injury from the defective chisel and the failure to supply goggles for protection to his eyes; the theory of a so-called "peremptory order" is not admissible; respondent is not entitled to recover, as a matter of law, and a verdict should have been directed for petitioner.

3. The Ohio Court of Appeals seems to have admitted that its decision may not have been in conformity with the decisions of the Federal courts. It said (R., 19):

> "It has been suggested that we should look to the Federal courts for interpretation of questions arising under the Federal Employers' Liability Act. This is the general rule but where our Supreme Court has passed upon a question, as it has this one, it is our duty to follow the decision of our Supreme Court rather than the decision of a court of some other jurisdiction."

The decisions of this Honorable Court and other Federal courts on the questions involved are authoritative and controlling, and the decisions of the Ohio courts are believed to be in conflict therewith.

The Supreme Court of Ohio and the Court of Appeals of Pike County, Ohio, erred as a matter of law:

In affirming the ruling of the Court of Common

Pleas of Pike County, Ohio, in overruling petitioner's motion to direct the jury to return a verdict in its favor (R., 80), in overruling petitioner's motion to vacate the verdict and award a new trial (R., 6), and in not reversing the judgment of said Court of Common Pleas.

Summary of Argument.

The assignment of error will be discussed under the following points:

Point I. *Neither a State statute nor a State rule of procedure may be invoked by a State court to support a recovery in cases arising under the Federal Employers' Liability Act unless there is substantial evidence to support the judgment.*

Point II. *Even if there were substantial evidence that the respondent "yielded his own judgment to that of the foreman"* (R., 18), *under a so-called "peremptory order", the holding of the State courts denying the defense of assumed risk is contrary to the rules of law established by the decisions of Federal courts.*

Point III. *There is no substantial evidence to support a finding that the respondent acted under any compulsion or that the foreman gave him any "peremptory order" and consequently the judgment cannot be sustained on that ground.*

ARGUMENT.

Point I. Neither a State statute nor a State rule of procedure may be invoked by a State court to support a recovery in cases arising under the Federal Employers' Liability Act unless there is substantial evidence to support the judgment.

Upon the second review of the case the Court of Appeals held that it was precluded from considering whether the verdict was against the "manifest weight" of the evidence and upheld the judgment on the ground that there was "some evidence" to sustain the theory of a "peremptory order", which, it held, denied the defense of assumed risk.

Neither the scintilla rule—which seems in substance to be what was applied—nor the State statute which has been referred to (Sec. 11577 of the Ohio General Code) have any potency in cases controlled by the Federal Employers' Liability Act. If the testimony and all the inferences which the jury may reasonably draw therefrom are insufficient to support the finding of the jury there can be no recovery.

New Orleans, etc., R. Co. *v.* Harris, 247 U. S. 367;

Western Atlantic R. Co. *v.* Hughes, 278 U. S. 496;

Herron *v.* Southern Pacific Co., No. 131, October Term, 1930;

Compare Central Vermont R. Co. *v.* White, 238 U. S. 507.

Point II. Even if there were substantial evidence that the respondent "yielded his own judgment to that of the foreman" (R. 18), under a so-called "peremptory order," the holding of the State courts denying the defense of assumed risk is contrary to the rules of law established by the decisions of Federal courts.

The applicable rule, applied by this Court, as to the assumption of risk by a servant of danger from a defective appliance, in cases under the Federal Employers' Liability Act, is that—

> "* * * a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him."
>
> Boldt *v.* Penn. R. Co., 245 U. S. 441, 445.

In such a case it has been said:

> "When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises out of the master's breach of duty."
>
> Seaboard, etc., R. Co. *v.* Horton, 233 U. S. 492, 504.

And when obvious or fully known and appreciated the employee likewise assumes the risk of negligence of his fellow-employees.

> Toledo, etc., R. Co. *v.* Allen, 276 U. S. 165, 169;
> Boldt *v.* Penn. R. Co., *supra;*

Chesapeake, etc., R. Co. *v.* De Atley, 241 U. S. 310.

In some jurisdictions the fact that the servant, at the time of his injury, was complying with a "direct, specific personal order" of the master or the master's representative has been held, under some circumstances, to destroy the defense of assumption of risk. See 4 Labatt's Master & Servant (2d ed.), sec. 1357, p. 3913 *et seq.*, where the subject is much discussed.

It is said, however, by Labatt in his discussion (*idem*, sec. 1367, p. 3952):

> "* * * it is clear that the fact of the servant's having acted under a direct order is immaterial, if it is apparent that he fully appreciated the danger which he was required to encounter,"

and this is supported by decisions of the Federal courts.

A leading Federal case is that of Union Pacific Co. *v.* Marone (C. C. A., 8th), 246 Fed. 916. There a section hand was assisting in cutting a rail with hammer and chisel. The rules required that goggles be furnished to protect the eyes of workmen. Goggles were in the tool-house when the accident occurred. The plaintiff knew of the danger. He was injured in the manner the plaintiff was injured in this case and the court held that he assumed the risk. The Marone case is stronger for the plaintiff than this case, because Marone asked for protection to his eyes and was told to "Go on; that it was all right; that the

workmen did not use goggles." Marone continued because he feared he might lose his job. The opinion is by Judge Sanborn and the brief concurrence of Judge Stone is right to the point.

A recent case is that of Hallstein *v.* Penn. R. Co. (C. C. A., 6th), 30 Fed. (2d) 594 (Ohio, 1929). There the plaintiff was directed to install lights in a coal tipple, so as to facilitate the loading of interstate engines at night.

He objected to doing the work without being supplied with a safety belt, as it was dangerous so to do. He was told that he had his orders, that the work had to be done, and "if it is not done you know what it will mean." He started the work and in the course of it was injured. He sued under the Federal Employers' Liability Act, alleging as negligence the failure to furnish the safety belt. On error, the court held that, knowing the danger, he assumed the risk; that the order to do the work after his objection was not an assurance of safety and the threat of discharge did not affect his assumption of the risk.

The court said (Judge Hickenlooper):

> "The doctrine of assumption of risk is ordinarily considered as resting upon the maxim '*volenti non fit injuria*,' or upon the contract of employment. Chicago, B. & Q. Co. *v.* Shalstrom, 195 Fed. 725, 729 (C. C. A., 8), 45 L. R. A. (N. S.) 387. And either basis of origin would support application of the doctrine in case of dangers fully known and appreciated, whether the employment is continued with or without complaint. Accordingly, the fact that complaint

was made and remedy refused under threat of discharge has been held insufficient alone to relieve the servant from assumption of risk. Washington Terminal Co. *v.* Sampson, 53 App. D. C. 179, 289 F. 577; Union Pac. R. Co. *v.* Marone, 246 F. 916 (C. C. A., 8); C. F. Hogan *v.* B. & O. R. Co., 15 F. (2d) 739 (C. C. A., 6), in which demand for a proper tool was made, and D., L. & W. R. Co. *v.* Tomasco, 256 Fed. 14 (C. C. A., 2), in which demand for a light was made and refused. The case of C., N. O. & T. P. R. Co. *v.* Thompson, 236 F., 1 (C. C. A., 6), in which Judge Cochran, speaking for the court, exhaustively considers the authorities, must be construed as deciding that the danger was not known and appreciated by the employee, for when so known and appreciated this court has consistently held that the risk is assumed. N. Y. C. & St. L. R. Co. *v.* McDougall, 15 F. (2d) 283 (C. C. A., 6). Compare, also, Pryor, Receiver, *v.* Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120."

See also:

Chicago, etc., R. Co. *v.* Shalstrom (C. C. A., 8th), 195 Fed. 725, 729;

Chicago, etc., R. Co. *v.* Crotty (C. C. A., 8th), 141 Fed. 913;

Kinzel *v.* Atlantic, etc., R. Co. (C. C. A., 6th), 137 Fed. 489;

Musser-Sauntry Land, etc., Co. *v.* Brown (C. C. A., 8th), 126 Fed. 141, 144.

The Ohio rule, as shown by the decision here, is in direct conflict and in cases like those just cited apply

the principle of a "peremptory order" given a servant by one in authority over him. A leading case in Ohio is that of Penn. R. Co. *v.* Malsek, 118 Oh. S. 644 (1928). The opinion is so brief it may be given substantially in full:

> "A majority of the court are of opinion that the matter is controlled by the principle of the cases where the master, or one in authority over the servant, peremptorily orders him to do a particular work, apparently dangerous, yet such as a reasonably prudent person, acting under the influence or restraint of such an order might in obedience thereto properly undertake to perform. The question whether a man of ordinary care and prudence, under such circumstances, would have proceeded with the work is one of fact for the jury, under proper instructions from the trial court."

Malsek was chipping away portions of a cross-tie with an adz. The tool was dull and nicked from usage and caused chips to fly in such manner as to endanger him. He complained to the foreman who told him he had no other adz, whereupon he continued to use it. Malsek then asked for a pair of goggles, and the foreman said he had none there, but that there was a pair at another station. Malsek was ordered to go forward with his work, and did so, and was injured by a chip striking his eye.

The opinion of the Court of Appeals in Malsek's case may be found in 26 Ohio Appellate Reports at page 520. It appears from that opinion that the majority of the Court held that the plaintiff was en-

titled to recover under "the Ohio rule as to peremptory orders." The dissenting member was of opinion that "under the United States law there is a clear assumption of risk." The facts of the case may be gathered from the majority and minority opinions in this report. The Common Pleas Court had directed a verdict for the defendant for the reason that the plaintiff testified that he knew and appreciated the dangers from the use of the adz.

Consideration of this opinion of the Ohio Court of Appeals leads to the conclusion that in Ohio the courts of last resort are not, in cases like the one at bar, applying the principles of common law, as established and applied in the Federal courts.

Tuck *v.* Chapple, 115 Oh. S. 177, is remotely similar upon the facts, but the only point involved in that case is the application of a State statute concerning "obedience to the immediate or peremptory instructions or orders given by the employer."

Point III. There is no substantial evidence to support a finding that the respondent acted under any compulsion or that the foreman gave him any "peremptory order," and consequently the judgment cannot be sustained on that ground.

Respondent made no complaint of the defective condition of the chisel—of which he was fully aware (R., 24)—and made no demand for goggles, although he knew of the danger to be apprehended from flying chips of steel (R., 29). No command was given him to work without goggles or to work with the chisel al-

leged to be defective. Nor was he threatened with discharge.

There was no direct, specific or personal order given him at any time in connection with the use of the chisel or as to the non-use of goggles.

Respondent could not recall anything out of the ordinary until his recollection was refreshed (R., 22), and then all he could recall, in this regard, was that the foreman told him "to gang up and go in a hurry; that he wanted to get through" (R., 22).

There is not even a scintilla of evidence to support the theory advanced by the appellate court that respondent acted under any compulsion other than that incident to every employment wherein the servant is subject to the general orders of a superior.

The evidence does not even remotely tend to support the finding and, therefore, the judgment of such court cannot be supported on the ground upon which it was based—a ground believed to be erroneous to start with.

It is, with great respect, submitted that the judgments of the Supreme Court of Ohio and of the Court of Appeals for Pike County, Ohio, are erroneous, and that they should be reversed.

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